FILE COPY

Supreme Court, U.S.
FILED
AUG 21 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 96

A. T. GORDON, ET AL.,

Petitioners,

vs.

GRANVILLE H. LANCE, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

BRIEF OF HAYES SMITH, AMICUS CURIAE

GEORGE E. SVOBODA, of
SIDNER, SVOBODA & SCHILKE
403 1st National Bank Bldg.
Fremont, Nebraska 68025
Attorneys for Amicus Curiae

COCKLE PRINTING CO., 1822 St. Mary's Ave., Omaha

INDEX

Pages

Interest of Amicus Curiae 1

Summary of Argument 4

Argument 7

I. Equal Protection and One Man, One Vote 8

II. State Interest in Imposing the 55% Plurality Requirement 12

III. Voting Errors and Irregularities 17

IV. Promotion at Public Expense 19

V. Political Question 22

VI. Presumption of Constitutionality and Adequate Hearing 28

Conclusion 32

TABLE OF CITATIONS

Cases:

Avery v. Midland County, Texas, 88 S. Ct. 1114 (1968) 12

Baker v. Carr, 369 U. S. 186 (1962) 4, 8, 25, 27

Bogert v. Kinzer, 465 P. 2d 639 (1970) 11, 26

Bute v. People of State of Illinois, 68 S. Ct. 763 (1948) 31

City and County of San Francisco v. Market

TABLE OF CITATIONS--Continued

Pages

Street Railway Company, CCA Cal., 98 Fed. 2d 628 (1938), certiorari denied, 59 Sup. Ct. 357 (1939) 31

Glisson v. Mayor and Councilmen of Town of Savannah Beach, 346 F. 2d 135 (1965) 14

Gray v. Sanders, 372 U. S. 368 (1965) 9

Gorin v. United States, CCA Cal., 111 Fed. 2d 712 (1939), affirmed 60 S. Ct. 429 (1940) 31

Harper v. Virginian Board of Elections, 383 U. S. 663 (1966) 12

Lance v. Board of Education of County of Roane, 170 S. E. 2d 783 (1969) 3, 25

Luther v. Borden, 7 How. 1, 12 L. Ed. 581 (1848) 26

McGowan v. The State of Maryland, 81 S. Ct. 1101 (1961) 13, 14

Reynolds v. Simms, 377 U. S. 533 (1964) 8

Shattack v. Gallagher, CA Ohio, 218 Fed. 2d 428 (1955) 31

U. S. v. Harris, 74 S. Ct. 808 (1954) 31

Walters v. City of St. Louis, 74 S. Ct. 505 (1954) 13

Wesberry v. Sanders, 376 U. S. 1 (1964) 9

Williamson v. Lee Optical, 348 U. S. 438 (1955) 28

Williams v. Rhodes, 393 U. S. 23 (1968) 12

Pages

Statutes:

Section 10-702, R. R. S. Neb. (1943) 1

Miscellaneous:

Rudolph, "The Reapportionment Cases: A Conservative Defense of Individual Rights", 84 Neb. L. Rev. 854 (1964) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

———o———

No. 96

———o———

A. T. GORDON, ET AL.,

Petitioners,

vs.

GRANVILLE H. LANCE, ET AL.,

Respondents.

———o———

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

———o———

BRIEF OF HAYES SMITH, AMICUS CURIAE

———o———

INTEREST OF AMICUS CURIAE

Section 10-702, R. R. S. Neb., a statute similar to West Virginia's 60% constitutional requirement, reads as follows:

> "No bonds shall be issued until the question has been submitted to the qualified electors of the district, and fifty-five per cent of the qualified electors

> voting on the question shall have voted in favor of issuing the same, at an election called for the purpose, upon notice given by the officers of the district at least twenty days prior to such election. * * *"

This law is the governmental control over the functions of the school board, emanating from the legislature, which is empowered by the Constitution of Nebraska, Sec. 6, Art VII, to provide for free education in the State of Nebraska.

Hayes Smith, the amicus, is a resident and property taxpayer of R. F. D., West Point, Cuming County, Nebraska. This brief amicus in support of the petitioners above is filed with the consent of the parties, as provided for in Rule 42(2) of this Court.

As a part of a new school building and facilities construction program in 1969, the school board of West Point School District, West Point, Nebraska, which levies a tax upon Hayes Smith, took various procedural steps to construct and finance new high school facilities. An election was set up under Nebraska statutes to submit to the 2300 registered voters of the school district the question of whether or not the district should issue general obligation bonds in the amount of $1,645,000 to pay for the new school and the accessories thereto. At that election 852 votes were cast in favor of the bond issue, 719 were cast against, and six ballots were spoiled and not counted.

Despite the fact that this vote did not result in the required 55% plurality in favor, a majority of the school board did move and adopt a resolution to proceed with the issuance of said bonds. These general obligation bonds create a tax lien upon the taxable properties of Smith and all others located within the school district, and can become payable over a thirty-year period. Shortly after the passage of this resolution, an injunction lawsuit was filed in the District Court of Cuming County, Nebraska, by Hayes Smith, the amicus curiae herein, to stop the issuance of these bonds, and at this time the District Court Judge has enjoined the issuance of the bonds on the grounds that the 55% statute is federally constitutional. The West Point School District has relied on the West Virginia appellate court decision, *Lance v. The Board of Education of Roane*, 170 S. E. 2d 779, now under consideration by your Court as *Gordon v. Lance, et al.*, Case No. 96, formerly No. 1244. The School District intends appealing to the State Supreme Court of Nebraska and probably to your court, if not successful at Nebraska level. The basic question of requiring more than a simple majority for approval of bonds is the same in this case as it is in the Hayes Smith injunctive lawsuit.

In addition, we do not feel that the majoritarian issue in this case can be decided in the abstract as the *Lance* case, supra, appears to have been at trial level. There are always factual reasons for laws enacted by the legislatures or adopted by constitutional committees that formulate the constitution for submission to the

people. There are only limited facts in the trial record of the trial. To have an important issue decided without factual reasons behind the statutory or the constitutional provision made a part of the trial court record by evidence or otherwise, in our judgment, is not a good example of an effective judicial process that protects the rights of all citizens, taxpayers, and minority citizens of the governmental unit involved. In order to determine whether rational and compelling state interests exist, such factors must be considered.

SUMMARY OF ARGUMENT

(1) The 55% plurality vote requirement for the issuance of school bonds provided for by Section 10-702, R. R. S. Neb., nor any reasonable percentage requirement, such as the 60% requirement in West Virginia, is not a violation of equal protection and the concept of one man, one vote. The long line of apportionment cases, beginning with *Baker v. Carr*, 369 U. S. 186 (1962), hold that a voter is denied equal protection of the law when his vote, in comparison to another vote in another district, is worth less because of the malapportionment of the legislative districts. These cases hold that every vote, in the election of public officials, must be counted the same as, and given equal weight in comparison to, each and every other vote. These cases do not hold that the one man, one vote concept demands that a state legislative body never impose a majority plus requirement in such special purpose elections as whether or not to incur

a 20 to 30 year bond indebtedness for the construction of educational facilities.

(2) The contention that the 55% plurality requirement of Nebraska or the 60% requirement of West Virginia amounts to a "discrimination" against and a "debasement" and "dilution" of the "yes" votes in the bond election is not, per se, prohibited by the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. As long as there are rational, compelling state interests in maintaining such a situation, and the distinction made among the votes is not "invidious" or "arbitrary" and bear a reasonable relationship to a valid legislative objective, the provision is not constitutionally fatal.

(3) Imposition of judicial guidelines with regard to how Legislators, who are elected on a one man, one vote basis, provide for the funding of local educational facilities would be an intrusion into an area which is manifestly political in nature, and would constitute a violation of the doctrine of Separation of Powers. Local factors, considerations, and objections can only be adequately measured and provided for by state and local decision-making bodies.

(4) The valid, rational state interests and objectives in maintaining more than a majority requirement are as follows:

a. Election errors of all kinds do occur in sufficient quantity to invalidate up to 5% of the voting. Statutory remedies to correct or prevent these are an empty remedy at law for the aver-

age taxpayer in his battle against undue taxation by direct vote.

b. There is an ability to remove or correct in a relatively short time a mistake in judgment in selecting a public official by vote. This short term correction ability does not exist for correction of mistakes for imposition of a long-term tax to finance school construction.

c. Requiring more than a simple majority in decision-making processes for matters of substantial imposition is embedded in the Federal and State Constitutions and judicial process. The existence of the provision negates the idea that the doctrine of majoritarianism was so sacrosanct in the minds of the framers of the Constitution that it must be adhered to in every vote on every issue in every level of the political and legislative system

d. Governmental funds, personnel, and energy were in fact used in the West Point School District election, and probably will always be used in all school elections to promote what school officials want. Unless it is conceded that school officials always work in the best interests of society and are always right, such a situation cannot be tolerated. The only counter action to this is requiring more than a simple majority.

e. When alternative projects regarding tax imposition are not presented to the voters, requiring more than a simple majority is a reasonable requirement.

f. A 4.99% or more additional requirement is reasonable in dealing with a political question of direct imposition of taxes by vote. Such a decision is within the wisdom, function and duty of a legislative body, who is more skilled in im-

plementing the processes of our laws than the individual voter.

———o———

ARGUMENT

The issue here relates not to a method of state electoral apportionment, but solely to the right of a state to set whatever standards it deems desirable for the funding of local educational systems. Nothing in the Equal Protection Clause or elsewhere in the Federal Constitution expressly or impliedly supports the view that state legislatures must be judicially supervised in their judgment on matters of purely local concern. It must be emphasized that we are dealing here not with a general election, but with a limited special purpose election regarding long term taxes for public improvements and not public officials. Such special purpose governmental authorities such as school districts, exist in numerous sections of the county, and participation in such districts is undoubtedly limited in many instances to those who partake of the Districts' services and are assessed for its expenses. The constitutional validity of such a policy has heretofore been unquestioned. It is difficult to conceive how a legislative determination of the procedures by which educational institutions will be funded, as long as everyone is indeed permitted to express their views at the polls and there is a rational justification for such procedures, presents anything approaching a distinction of constitutional dimension. It must be pointed out that all the electors of the School District are eligible to vote in all state, local and federal elections in which general

governmental policy is determined. Each elector is fully able, therefore, to participate not only in the processes by which the requirements for School District voting may be changed, but also in those by which the levels of state and federal financial assistance to the District are determined. They are not locked into any self-perpetuating status of exclusion from the electoral process.

I. Equal Protection and One Man, One Vote

To hold that the one man, one vote principle set forth by the Supreme Court beginning with *Baker v. Carr*, 369 U. S. 186, invalidates the provision in question would place the judiciary in the midst of a "political thicket" clearly not envisioned by or within the purview of these decisions. In those cases, the Supreme Court held that the courts have jurisdiction to determine the constitutionality of statutes which provide for the selection of legislators (public officials) on the basis of unequal population apportionment, and has declared such statutes to be unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. They also held that seats in the legislative branch of state governments must be apportioned substantially upon the basis of one person-one vote.

In *Reynolds v. Simms*, 377 U. S. 533, the court stated:

> "• • • we conclude that the equal protection clause guarantees the opportunity for equal participation by all voters *in the election of state legislators*." (Emphasis added.)

Gray v. Sanders, 372 U. S. 368, held that:

"• • • the idea that every voter in his state, *when he casts his ballot in favor of one of several candidates*, underlies many of our decisions." (Emphasis added.)

Wesberry v. Sanders, 376 U. S. 1, decided that an apportionment of congressional seats which contract the value of some votes and expands the value of others is unconstitutional, since:

"The federal constitution intends that *when qualified voters elect members of Congress each vote be given as much weight as any other vote* • • • no right is more precious in a free country than that of having a voice in the election of those who make the laws under which as good citizens, we must live." (Emphasis added.)

Additional quotations and citations from the leading apportionment cases would be redundant. It will suffice to say that in fact, and in law, the Nebraska provision in question is not inconsistent with the one person, one vote principle, and this principle was not violated at the school bond election at West Point in which the proponents of the additional levy and the bonds failed to obtain a vote of 55% in favor. The holding in all the above cited cases involved the constitutionality of legislative apportionment schemes, and such holdings are not applicable to the case at bar.

In pointing out what the reapportionment cases do not hold, Rudolph commented in "The Reapportionment Cases: A Conservative Defense of Individual Rights", 84 Neb. L. Rev. 854 (1964), that:

> "* * * Basically the criticism (of the reapportionment cases) is based on the false premise that the Court has been trying to establish democratic majoritarianism as the only form of government. The critics of the Court have complained that there was no purpose in equalizing the vote as long as gerrymandering, the seniority system, or any other limitation of majority rule exists. These critics have missed the point of the courts' protection of individual rights and property. The decision does not prevent the establishment of a system where a majority as large as 90% may be required to impose external cost on individuals * * *. The court in fact encourages experimentation with the covenant that each individual be given an equal voice in the distribution of public expenditures."

Thus, in each of these cases, the apportionment of seats in one or both houses of the legislature was declared to be violative of the Equal Protection clause on the ground that the apportionment on a population basis with respect to different political subdivisions of the state was unequal, and that a person's right to vote for State legislators was unconstitutionally impaired when its weight was unequal in comparison with votes of citizens living in other subdivisions of the state.

When the aforementioned cases refer to "debasement" of the right to vote they refer to a situation caused by legislative malapportionment. In the school bond election, the question of apportionment on any population basis did not exist, and there was no debasement or dilution of the vote in this sense. In that election each voter cast one vote and each was counted as such. Thus, there is a significant and obvious distinc-

tion between denial of equal protection with respect to malapportionment and the alleged denial in the instant case. The Nebraska legislators (elected under the one man, one vote concept) obviously felt that the issuance of bonds to extend over a long period to burden the taxpayers for educational purposes merited such import and consideration that more than a simple majority was required. This is a decision made by the duly elected representatives of the people of Nebraska on how to assess and use their bond revenues—not how to elect representatives.

In upholding the Constitutional and Statutory provisions of Idaho authorizing the issuance of general obligation bonds by subdivisions of government only on assent of two-thirds of the qualified electors voting at elections held for such purposes was not offensive to Equal Protection and one man, one vote, Justice Shepard, for the majority in *Bogert v. Kinzer*, 465 P. 2d 639, stated that:

> "What, then may we view as logical and coherent threads running through the above decision? Votes cast in the process of selecting representatives in government may not be debased to the end that one person's vote is worth more than another's because of geographic location. Persons may not be denied the right to vote for their representatives in government because of distinctions which are 'invidious'. Evidently, the determination of 'invidiousness' will be made on a case by case basis but includes at least factors of race, wealth, property ownership and military service. * * * We believe and hold that nowhere in the lines of cases is there even a hint that the constitutional and statutory provisions in the case at

bar, which allegedly 'debase' the vote of plaintiffs-respondents, are offensive to the requirement of the Equal Protection Clause * * *."

II. State Interest in Imposing a Sufficient Majority Requirement

It is true, that the "weighting" of votes as necessitated by the Nebraska Statute in this instance must not be "invidious or arbitrary" and must have a "rational basis", *Harper v. Virginia Board of Elections*, 383 U. S. 663, and be based upon a "compelling state interest", *Williams v. Rhodes*, 393 U. S. 23. However, these decisions do not preclude the states from ever weighting votes or distinguishing between electors. As the court stated in *Avery v. Midland County*, 88 S. Ct. 1114:

> "The equal protection clause does not, of course, require that the states never distinguish between citizens but only that the distinctions not be arbitrary or invidious * * *. The court is aware of the immense pressures facing units of local government and the greatly varying problems with which they must deal. The constitution does not require that a uniform straight jacket bind citizens in devising mechanisms of local government suitable for local needs and efficient solving of local problems."

In a similar vein, the court in *Williams v. Rhodes*, supra, stated:

> "In determining whether or not a state law violates the equal protection clause we must consider the facts and circumstances of the law, the interest in which the state claims to be protecting, and the interest of those who are disadvantaged by the classification."

In *McGowan v. The State of Maryland*, 81 S. Ct. 1101, the Supreme Court rejected the contention that the statutory arrangement which permitted only certain Anne Arundell County retailers to sell merchandise essential to, customarily sold at, or incidental to the operation of bathing beaches was contrary to the equal protection clause, because it discriminated against retailers in other Maryland counties. This discrimination in treatment was justified by the state interest in maintaining such a situation. The court said:

> "Although no precise formula has been developed, the court has held that the Fourteenth Amendment permits the state a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the state's objective * * *. A statutory discrimination will not be set aside if any state of facts reasonably may be construed to justify it."

In holding that the treatment of wage earners differently for municipal income tax purposes than those receiving profits from self-employment or business enterprises was not per se a prohibited discrimination, the Supreme Court in *Walters v. City of St. Louis*, (Missouri) 74 S. Ct. 505, stated:

> "* * * The power of the state to classify according to occupation for the purposes of taxation is broad. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, and that the distinction have some relevance to the purpose for which the classification is made, and that the dif-

> ferent treatment be not so disparate, relative to the difference in classification, as to be wholly arbitrary."

Thus, the fact that a particular state statute or constitutional provision discriminates or treats voters differently is not, of itself, a violation of Equal Protection so long as there is a legitimate, rational legislative objective being sought.

In a situation somewhat more analogous to the case at bar, the Fifth Circuit Court of Appeals in *Glisson v. Mayor and Councilmen of Town of Savannah Beach*, 346 F. 2d 135, affirmed the lower court decision upholding the right of the State of Georgia in granting municipal charters to make reasonable classification with respect to the right to vote in municipal elections. This court, citing *McGowan*, supra, in support, stated that:

> "It is apparent from the face of this legislation that there could be a logical and sensible reason for permitting non-residents owning property in the municipality to vote in the municipal election on an equal basis with resident persons, whether or not they are property owners. The nexus between the two is that each of them obviously has an interest in the operation of city government. Such a rational objective apparent it was, of course, correct for the district court to determine that the municipal charter did not offend the Fourteenth Amendment to the United States Constitution."

Using the same rationale as the Respondents in the case at bar, the effect of this Georgia provision is a "debasement" and "dilution" of and "discrimination" against the vote of the municipal residents who do not own prop-

erty. The important factor in this case, however, as in the case at bar, is that no voter was excluded from the electoral process, and the legislative interest was reasonable and compelling; providing non-resident property owners with a voice in municipal government out-weighed the distinction in the treatment of voters. We contend that the minimal "debasement" of the "yes" vote in the West Point bond election is far outweighed by rational and compelling reasons for the establishment of such a requirement.

It is important to point out at this point that the respondents divide voters neatly into categories of "pro-education" and "anti-education", that is, the electors voting against the improvements must be against all educational improvements. No evidence appears at trial level on this point, for there was only an abstract presentation of constitutional question by the pleadings, similar to what one would find in a high school political text book. The question is far more complex, and does not lend itself to such simplistic analysis and categorization. As shown by evidence in the *Hayes Smith v. West Point School District*, Case No. 5646, in the District Court of Cuming County, Nebraska, in Exhibit 5, the records of past West Point School Board meetings, there have been attempts by a minority of the members of the School Board to submit to the electors the question of issuing bonds in the amount of $700,000, rather than the proposed $1,645,000, which in the judgment of the minority was sufficient. Thus, the point in dispute amongst electors in the Nebraska case is one of degree rather than improvements or no improvements. Most disputes in

school bond elections are of this nature, for only illiterate persons would justifiably argue there is no need for improvement in education. It would be imprudent to spend the larger amount when a smaller amount would suffice, and there are strong indications in the *Smith v. West Point* case, supra, that the smaller amount would meet the educational demands of the area. A "gilded building program" is not always the answer to quality education and in the best interests of the taxpayers when a more prudent, economical course is available. In most school election proposals there is always an alternative plan. Once the long term debt is imposed it cannot be removed for the entire term. The mistake is a long term mistake. If an elected official proves to be a mistake, he can be removed in a short time; thus there is a political and practical difference between an officer election and a bond issue election.

However, the electors are given by the proposition submitted in this case only an opportunity to vote "yes" or "no". Yet respondents herein and their compratriot, West Virginia Education Association (a teacher's union) imply by their arguments at State Court level that those voting against the propositions are per se against education. There is no evidence to this effect in the record of this case. In the *Hayes Smith* case in Nebraska, there was specific evidence that he personally, when he was a member of the School Board, moved the adoption of a less costly building plan be submitted to the voters. Thus, it cannot be said or even implied that Hayes Smith or those who voted "no" on a specific program proposition anywhere are anti-education minded. No one can tell

from the record in the instant case whether there were alternative plans involved or not. We have to assume that all the "no" voters in West Virginia were not all illiterates. Since the mechanics of voting on a single proposition submitted to the electors does not lend itself to an accurate portrayal of what voters really want, then it does seem fair and reasonable to require more than a simple majority when submitting a proposition. This is particularly true when coupled with the practicality of life which is that as to a school improvement question one would expect the school board, teachers, teachers' organizations and school administrators will be at taxpayer's expense promoting the school improvement, which concept is discussed hereafter.

III. Voting Errors and Irregularities

The evidence in the Nebraska case shows, without contradiction, that election errors do occur in Nebraska and in the election of one official it ran as high as 2%. A casual reading of newspapers throughout the nation after an election and the cases in the lawbooks show election errors of various kinds occur throughout the United States. Even the voting machines do not correct the human errors in voting. Recognizing the frailties of humans, it would seem fair and reasonable that the Nebraska statute which provides for a margin of error of 4.99% by requiring more than a simple majority for the imposition of a general property tax of this type is not unreasonable as to the point of election errors. As stated in earlier paragraphs, this is not an election of representatives, mayor, or governor, but rather for or against

the direct imposition of a tax for a period of 20 to 30 years. There is no opportunity in this latter instance to "remove" the tax at a later date, as in the case of public officials, if the results of the election do not meet with the approval and expectations of the electors. In the West Point election, for example, those voting in favor of the bond issue represented only 33% of the eligible voters and evidence shows there were election irregularities.

It will be contended that more than a simple majority is not needed to correct errors in elections, since there is an adequate remedy at law to prosecute violators for irregularities and errors, etc. As a practical matter, however, in the case of an election regarding school improvements, this is an empty remedy, for it is seldom that taxpayers are going to take upon themselves the responsibility and expense of challenging an election because of errors, improper solicitation of votes or failure to comply with the mechanical steps in electoral procedures. Further, there is not the same motivation by the general taxpayers to challenge bond elections as there is by a nominee who lost by a small margin. He is motivated economically and by prestige to seek the remedy at law to challenge the election for errors and improprieties. There is no group or no voter so motivated in an election involving taxes. This, of itself, is sufficient compelling reason to require a reasonable additional number of votes in a direct imposition of tax by vote. A 2% error can happen as shown by the evidence in the Nebraska case. Thus, since this error can be two ways, it

is not unreasonable to require a 5% margin for imposition of taxes. When a special purpose election of this nature is involved regarding the imposition of a tax and not the election of representatives, it is the duty and the power of the legislature to take such contingencies into consideration. We believe that only an empty remedy at law exists for the taxpayer in his battle against undue taxation by direct vote. It is asking too much of citizen taxpayers to act as F. B. I. agents to ferret out election errors, mistakes, deliberate or unintentional violations of election laws, to determine whether in fact a simple majority properly voted for the tax. To say that there is an adequate remedy at law under such circumstances is an empty phrase, because it costs time, money and effort on the part of some individual citizen to challenge the governmental school establishment which is generally seeking to improve its own lot, including the buildings in which it works.

Voting irregularities, voting patterns of elections generally and the long term impact of this particular tax provides sufficient grounds and a rational criteria for legislative determination: manifestly a compelling state interest in demanding more than a simple majority. The equal protection clause does not preclude a state legislature from regulating the procedures and requirements of such matters of purely local concern.

IV. Promotion at Public Expense

In the *Hayes Smith* case there was without question the promotion of a particular school improvement pro-

gram, funded by public tax funds and the services of employees of the school district. The school children were urged by their teachers to encourage their parents and friends to vote for the school improvement program. Posters were placed at various points in town, and a comprehensive pamphlet was published and disseminated among the voters, all of which was financed through public funds. No such tax funds or school personnel were used, directed, or allowed to present the "no" side of the issue. Nebraska Education Association was active in promotion and we assume the West Virginia Education Association was also in the case, for their statistics appear attached as a pamphlet exhibit to the original companion complaint, Case No. 1063, regarding excess levies. See Original Record Transcript, Pages 70 to 98.

Active campaigning for public officials and public improvements, when done by private individuals with the use of private funds is an admirable aspect of our electoral process. Indeed, it is one of the few vestiges of "popular democracy" which still exists in our system of government. However, using public funds and the time and energies of public employees in a public capacity to promote one side of an issue can no more be condoned than permitting an incumbent Senator to campaign using public tax funds; particularly when the other candidate, or in this instance, the other side of the issue, is not given similar and equal access to such resources. There generally are no established counter agencies financed by public funds to promote the other side of the issue. There are all kinds of public agencies for poor and minority groups paid for by the taxpayers to challenge the unfair

governmental actions, but none for the taxpayer has developed in this country as a counter force. Once again, the only available remedy is for the taxpayers to get together individually, without the benefit of organizational aid other than their own, and at private, not public, expense.

It is a physical impossibility to keep the school boards, school management and teachers from speaking out or promoting one way or another in favor of bigger schools, and it may even be unwise politically to place strong limitations upon them in this regard. Recognizing such a factual human situation that cannot be effectively controlled by legislation, the only effective brakes upon the "school establishment" selling program is to require more than a simple majority, for if the building program is so good for the community and so absolutely needed, a substantial number of voters should be so convinced and the "school establishment" with its built-in advantages for selling should be able to sell it. Otherwise, with a one-sided sales promotion on only one choice, the school establishment can easily with a simple majority keep selling a school district into over spending and bankruptcy. To prevent this one-sided approach to the bigger schools, there is a compelling interest in the fiscal soundness of the district to require more than a simple majority on long-term tax impositions, and certainly a 4.99% majority is not of substantial nature.

We have imbedded in our whole legal and political systems the concept of having more than a simple majority vote when dealing particularly with principles. In

the civil jury trial, Nebraska requires 10/12ths. Nationally, 2/3rds votes of Senators are required by the Constitution. There are many others. These more than a majority requirements are built into our democratic process partially to protect against the excesses of the simple majority, but also as a recognition of human frailties that become involved in any electoral process or decision process, so that when a long range decision is rendered, there are a substantial number of people who concur in the decision.

V. Political Question

If the Nebraska provision is declared invalid, so also in principle and in logic are the provisions of the Nebraska Constitution which requires a two-thirds or three-fifths vote to accomplish the intended result. For if the duly elected representatives of the people of Nebraska are not constitutionally permitted to enact a statute requiring more than a majority in some instances, then neither can the people establish a constitution which requires more than a majority in some political decisions. At least at nine different places in the Nebraska Constitution are there requirements of more than a simple majority to have a political action.[1] It is reasonably safe

---

1. Article III, Section 10; with regard to expulsion of members of the legislature, "* * * No member shall be expelled except by a vote of 2/3 of all the members * * *."

   Article III, Section 22; Appropriations. "Each legislature shall make appropriations for the expenses of the government until the expiration of the next regular session * * * and whenever it is deemed necessary to make further appropriations for deficiencies, the same shall require a 2/3 vote of all members elected * * *."

(Continued on following page)

to say that other state constitutions have similar restrictions on the majoritarian concept.

(Continued from previous page)

Article III, Section 27: Acts take effect after three months; emergency bills; session laws. "No act shall take effect until three calendar months after the adjournment of the session at which it passed, unless in the case of emergency * * * the Legislature shall, by a vote of two-thirds of all the members elected to each House otherwise direct."

Article IV, Section 15: Bills and resolutions to be presented to Governor; approach; procedure; disapproval or items of appropriations. "Every bill passed by the Legislature, before it becomes law, and every order * * * shall be presented to the governor * * * but if he does not approve, he shall return it with objections to the House * * * . If then three-fifths of the members elected agree to pass the same, it shall be sent together with the objections to the other house, by which it shall likewise be considered; and if approved by three-fifths of the members elected to that house, it shall become law, notwithstanding the objections of the governor.**"

Article V, Section 2: Supreme Court. "No legislative act shall be held unconstitutional except by the concurrence of five (of the seven) judges."

Article XII, Section 5: Elections for directors or managers. "Voting rights of stockholders** in all elections for directors and managers of incorporated companies, every stockholder shall have the right to vote in person or proxy for the number of shares owned by him."

Article XIII, Section 2: Donation to Rail Roads; how made. "No city, town precinct** shall ever make donations to any railroad, or other works of internal improvement, unless a proposition so to do shall have first been submitted to the qualified electors thereof**. Provided, further, that any city or county may by a two-thirds vote, increase such indebtedness**."

Article XVI, Amendments; Section 1; How proposed. "The legislature may propose amendments to this constitution, if the same be agreed to by three-fifths of the members elected to the Legislature."

Article XVI, Amendments; Section 2: "When three-fifths of the members of the legislature deem it necessary to call a convention to revise, amend, or change this constitution**."

The possible conflict here between the Nebraska Statute in question and the Equal Protection Clause of the Fourteenth Amendment is also negated by the existence of numerous similar provisions in the Constitution of the United States by which a two-thirds vote or three-quarters vote is required for political actions. The United States Constitution has at least four provisions requiring more than a majority for certain political actions.[2]

---

2. Article I, Section 3, relating to impeachments, states in part, that "And no person shall be convicted without the concurrence of two-thirds of the members present."

   Article I, Section 7, relating to the passage of bills and resolutions, states in part, that "If after such reconsideration two-thirds of that House shall agree to pass the bill, it shall be sent, together with the objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of the House, it shall become a law"; and "Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary** shall be presented to the President of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives according to the rules and limitations prescribed in the Case of a Bill."

   Article II, Section 2, relating to the powers of the President, states in part, that "he shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur."

   Article V, relating to Amendments to the Constitution, states in part that "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several states, shall call a convention for proposing Amendments, which, in either case, shall be valid to all intents and purposes, as part of the Constitution when ratified by the Legislatures of three-fourths of the several states or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress."

These provisions in the Federal Constitution also evidence an intent among the Founding Fathers not to require a simple majority in every decision making process and the realization that in many instances when a substantial burden or significant change is contemplated, a majority plus requirement is often the wisest course.

Haymond, President, in dissenting from the majority in the case of *Lance v. The Board of Education of County of Roane*, supra, expressed this same concept.[3] Thus it appears that to hold the Nebraska statute or other statutes requiring more than a simple majority invalid would place the constitutionality of a significant portion of the Nebraska and other state constitutions in doubt. This raises the serious question as to how far the judiciary is going to extend the one man, one vote concept as first enumerated in *Baker v. Carr*, supra. The apportionment cases initiated an entrance by the courts into an area previously thought inherently "Political" and thus outside their jurisdiction under the doctrine of separation of powers. The issue now is whether the Equal Protection Clause will be used not only to guarantee "one man, one vote" in the election of public offi-

---

3. Lance v. Board of Education of County of Roane, 170 S. E. 783, page 798. "There is no conflict or inconsistency between the above quoted constitutional provisions and the Equal Protection Clause of the Fourteenth Amendment and all such provisions are, of course, valid and effective. **no court has ever indicated that there is any such conflict or inconsistency and it necessarily follows that there is no inconsistency between the Equal Protection Clause and the two constitutional provisions here involved and the other provisions of the Constitution of this state which are similar to the quoted provisions of the Constitution of the United States, all of which require more than a majority vote**."

cials, and in the apportionment of legislative districts, but to force the states to base all elective decisions on a bare majority to prevent the "debasement" of individual votes no matter how rational or imposing the reasons may be for making decisions on the basis of other criteria. The court in the *Bogert v. Kinzer case*, supra, in considering this point stated:

> "However, it is a far different thing for this court or any court to insert its judgment into the area of pure political theory. We do not believe that the theory of 'one man, one vote' as discovered in the Equal Protection Clause, militates against and prohibits the continuation of a political theory which lies at the foundation of our government, which, simply stated, is a consensus amounting to more than a simple majority is not only desirable, but necessary at certain times and under certain circumstances * * *."

Once the special purpose election is recognized for what it is, the product of legislative give-and-take, the compromising among policies that often conflict, and the consideration of local facts, peculiarities and objectives, it becomes evident that the process is inherently political in nature and outside the jurisdiction of the judicial branch of the government. There is also a right not to vote involved. Since this affects the majority expression of all registered voters, the legislatures, knowing that in America there is not a high percentage of voters, can require more than a majority of those voting to get a true consensus of the electors.

The court in *Luther v. Borden*, 7 How. 1, 12 L. Ed. 581, pointed out the dangerous consequences of such poli-

tical type activities by the courts, in considering whether or not to invalidate a chartered state government:

> "* * * For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned, if it had been annulled by the adoption of the opposing government, then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensations to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void * * *. When the decision of this court might lead to such results, it becomes its duty to examine very carefully its own powers before it undertakes to exercise jurisdiction."

In the case of *Baker v. Carr*, supra, after reviewing the decisions in the area of what is or is not a "political question", the court concluded that on the surface of any case held to involve a political question was at least one of the following formulations:

> "a textually demonstrable constitutional commitment of the issue to a co-ordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the possibility of a court's undertaking independent resolution with expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to the political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question."

The case at bar falls within this definition of a "Political question". A determination of the procedures and manners by which local education will be funded can only be managed adequately and effectively by local policy making bodies. The "wisdom" of such legislation cannot and should not be determined by the courts.

With respect to state tax statutes and regulatory measures, for example, it has been said that the "day is gone when this court uses the * * * Fourteenth Amendment to strike down state laws * * * because they may be unwise, improvident, or out of harmony with a particular school of thought", *Williamson v. Lee Optical Co.*, 348 U. S. 483. It is all the more compelling to follow this principle of self-restraint when what is involved is the freedom of a state to deal with so intimate a concern as the maintenance, improvements, and funding of its educational system. Judicial interference in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process itself is weakened. This would be a disservice to the broader values of our system of government.

VI. Presumption of Constitutionality and Adequate Hearing

We submit there has been an inadequate trial of the issues at trial level in this cause to justify decision by this court on issues reaching into every governmental or organizational system in the United States in the face of the rule of strong presumption of constitutionality. Factual reasons for the constitutional or statutory re-

quirements are not in evidence. At trial level there is an answer by the Board of Education of the County of Roane with some general constitutional-political affirmations represented by about two pages of Transcript, pages 64 and 65 in the Original Record *with no exhibits*, while plaintiff's (respondent, Granville H. Lance) initial complaint in the Original Record at pages T3 to 14, is a document of 11 pages with numerous exhibits reaching to page 56 in the Original Transcript Record, apparently prepared by the West Virginia Education Association, a counter-part of the Nebraska Education Association. The latter has actively taken over the defense of the *Smith* case in Nebraska. Perhaps Roane County didn't believe in a full portrayal of factual reasons for the anti-majoritarian legislation. We find none of the practical political reasons referred to above shown in the defense of the 60% requirement, and merely generalized phrases of political concepts (see App. pp. 19a, 20a and part of 21a). Plaintiff's complaint *without exhibits* covers 13 printed pages, 4a to 17a of the Appendix, interlaced with political type complaints of the West Virginia constitutional processes that are so time-consuming that only the courts can handle and make "* * * the improvements necessary to meet the educational requirements of Roane County * * *," Appendix, 15a. This case represents two original cases consolidated, with one of the exhibits, being a pamphlet study by the West Virginia Education Association. Perhaps there are no voting irregularities or errors in West Virginia and the "school establishment" in West Virginia never attempts to promote a bond issue and its voters will never vote for any

kind of school improvement plan or any alternative plan. From reading the record in this case, it is clear we will never know anything about these facts of this political constitutional question. It may be that historically the property owners got the 60% requirement on the books in West Virginia, but if they have any one man, one vote concept in West Virginia supporting their elected representatives, we submit that that is the body to change the law and not have the Supreme Court do it.

It is significant that the record contains no evidence showing the 60% requirement as being reasonable or unreasonable infringement upon the voters' rights. The record shows at most that the West Virginia Education Association has lost a number of local improvement questions under the 60% requirement. No evidence shows that any alternative plans were also denied by the voters. In the bond question involved in this case 48.45% said they did like the improvement plan submitted. This is quite a substantial group. They didn't say they wanted no improvements at all. Electors through their constitutions or elected representatives can impose some self-restraints on their own local governmental functionaries for this is the essence of constitutional government. Also, various restraints upon electors are imposed for the good of all by representatives of those electors elected on a one man, one vote basis. The Federal Constitution does not envision a popular direct vote on every issue to regulate ourselves. It envisions laws enacted based on representative voting. The voting for those individuals has to be decided by the simple majority, if for no other reason than to get a decision as to who that

representative is; otherwise, this decision would have to be by combat as it was historically. We think it strange for certain "enlightened" West Virginians to make an official complaint to United States courts that their own constitutional state governmental machinery is so cumbersome or time consuming that they, the enlightened ones of West Virginia, must ask that the Supreme Court strike it down, and further alluded that their own "unenlightened" do not want to improve their educational lot. This is the thrust of their case. We submit that such a matter is purely of local concern, and that so long as the restraints are not so onerous as to severally shackle the governmental obligation to educate and the compelling state interest is related to fiscal policies, not election of officials. that the Supreme Court should not be concerned with the internal problems of West Virginia. The cardinal rule for the construction of a statute or a state constitution is to uphold its constitutionality, *U. S. v. Harris*, 74 S. Ct. 808. Every statute is presumed to be constitutional, *Bute v. People of State of Illinois*, 68 S. Ct. 763, and this presumption obtains, unless invalidity is clearly shown beyond reasonable or substantial doubt, *Gorin v. U. S.*, CCA Cal., 111 Fed. 2d 712, affirmed 60 S. Ct. 429. Plaintiff must overcome by facts judicially known or proved any state of facts which can be reasonably conceived to sustain it. *City and County of San Francisco v. Market Street Railway Co.*, CCA Cal., 98 Fed. 2d 628, certiorari denied, 59 S. Ct. 357. This presumption of validity is strong, *Shattack v. Gallagher*, CCA Ohio, 218 Fed. 2d 428. No evidence shows that plaintiffs in this case were denied right to vote or

the opportunity to change the laws or the constitution of West Virginia. There is found in pleadings only a failure to convince enough electors under West Virginia laws as to need for certain educational expenses. This internal state problem should be decided by the electors of West Virginia by changing their constitution or laws, and not have this Supreme Court do it. Certainly, if there is to be a judicial hearing as to an issue affecting the whole United States, there should be a full scale presentation of facts and political evidence with opportunity for all the states to present their reasons for their individual level of self-imposed restraints on the direct decision powers of voters. This case in our judgment should at a minimum be sent back for retrial, if the Supreme Court is going to give serious consideration to imposition of the simple majoritarian principle upon all governmental decisions in these United States.

———o———

CONCLUSION

The issue here relates not to a method of apportionment nor a denial of the right to change the laws of West Virginia by vote, but solely to the right of a state to set whatever standards it deems desirable for the funding of local educational systems. There is a "weighing" of votes in the case at bar, but under the circumstances, it is not significant enough to be termed unreasonable, and

the state interests involved are sufficiently "compelling" and "rational" to justify requiring more than a simple majority.

There is no area more inherently and necessarily political in nature than the funding of local education. Circumstances of procedures and the necessities of these types of problems can only be determined by the state. None of the electors in West Virginia or Nebraska were excluded from the electoral process. Members of the Nebraska Legislature were elected on a one man, one vote basis and we assume for these purposes that the West Virginia Legislature was so elected, and to date the guarantee of a "republic form of government" and "Equal Protection Under the Laws" has been construed to guarantee that elected representatives shall be so elected. This concept has not, and should not be used as a basis for dictating that all decisions made by state legislators, or the electors themselves, should be made on a basis of a simple majority.

We submit that the decision by the West Virginia Supreme Court of Appeals be reversed and that judgment by the Circuit Court of Roane County be sustained, and the petitions dismissed, or in the alternative that the case be remanded to the Circuit Court of Roane County, West Virginia, for further proceedings, based upon a full trial of all issues and facts supporting the compelling

state interest in retaining the 60% constitutional and statutory requirement for imposition of taxes.

Respectfully submitted,

GEORGE E. SVOBODA, of
SIDNER, SVOBODA & SCHILKE
403 1st National Bank Bldg.
Fremont, Nebraska 68025
Phone 402-721-7111
Attorneys for Amicus Curiae

August, 1970